United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

77-1001

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1001

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

MATTHEW MADONNA,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANT MATTHEW MADONNA

EDWARD BENNETT WILLIAMS
HAROLD UNGAR
Attorneys for Defendant-Appellant
1000 Hill Building
Washington, D. C. 20006
(202) 331-[illegible]

GRAHAM HUGHES
Of Counsel

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Appellant Madonna finds it unnecessary, for the most part, further to fortify the arguments relied upon in his main brief,[1] for the government's brief leaves those arguments essentially unshaken. In this reply brief, therefore, appellant will confine himself to commenting upon several points as to which the government's appetite for victory may have led it to some excesses.

1. We have shown, as an exemplification of the thinness of the case against Madonna, how illogical it is to conclude that his purpose in renting the red Ford on August 19, 1976 was to provide transportation for the heroin in the absence of any evidence that he knew the

[1] Appellant's main brief will be referred to herein as "A.B." and the government's brief as "G.B."

heroin was to arrive the next day. We characterized it as a shabby device for the prosecutor, knowing that he had no such evidence, to relate the rental of the car to the August 19 arrival in New York of Tra[illegible]s, a man of whom Madonna had never heard. A.B. 7.

Even if it did not see fit to admit in this Court that it has no evidence that Madonna knew when the heroin was to arrive or when Travers was to arrive or, indeed, who Travers was, the government ought not to cling here to the unsupported point. Yet the government argues here:

> "On the same day Travers returned to New York, Madonna emerged from his concealed position as Larca's senior partner to rent a car to carry the anticipated Thai heroin." G.B. 12.

2. As a further indication of how thin the case against Madonna was, we have shown that the government, notwithstanding its surveillances on all the actors in this drama, produced no testimony for the very keystone of its theory: that Madonna *arrived at Larca's house with Larca.* A.B. 11-12.

In its brief in this Court, the government, unwilling to admit this deficiency in its case, seeks to fill the gap by misrepresenting the testimony of Boriello. Boriello testified that he was sitting down inside Larca's house when "Sal came in with Mr. Madonna." T. 218-19. That testimony is now represented to this Court as supporting the following assertion:

> "When they [the agents] were leaving the area they saw Larca leave as well and drive toward Bronx Park East. While they did not follow him, an hour later *Larca returned with Madonna* and entered Larca's home, where Larca introduced Madonna to Boriello. (T. 219)." G.B. 14 (emphasis added).

3. The argument to which the government devotes the most space is a multi-faceted defense of the denial of Madonna's motion to preclude his prior conviction as impeachment. G.B. 26-34. But the mere multiplication of facets cannot make a diamond out of paste.

(a) The first facet of the argument is that Madonna did not flatly commit himself to take the stand, so that the denial of his motion was merely the judge's "declination to make a determination without a concrete factual situation before him . . . ." G.B. 26-27. The government must know, however, that this argument is specious. At least since *United States* v. *Palumbo*, 401 F.2d 270 (2d Cir. 1968), *cert. denied*, 394 U.S. 947 (1969), a defendant has had the right to seek an *advance ruling* on the question whether, *if he should testify*, a prior conviction would be admissible to impeach him. See also *United States* v. *Puco*, 453 F.2d 539 (2d Cir. 1971). The obvious point of authorizing such advance rulings is to allow the defendant to defer his decision on whether or not to waive his privilege against self-incrimination until he has ascertained whether his prior conviction may be used to impeach him.

That Madonna was careful, both before filing his motion and after its denial, not to do anything that might constitute a waiver of his privilege does not signify, as the government contends at G.B. 27-28, that he would not have waived it had his motion been granted. The government points to Judge Friendly's observation in *United States* v. *Morell*, 524 F.2d 550, 558 (2d Cir. 1975), that it is unusual for defendants in narcotics cases to testify in their own defense. On the other hand the government can hardly be unaware of the studies showing that many criminal defendants, innocent as well as guilty, fail to take the stand for the very reason that their prior

convictions are permitted to be used to impeach them. See Frank, *Not Guilty* 106-07 (1957); Borchard, *Convicting the Innocent*, 138, 232, 365-66 (1932); Kalven & Zeisel, *The American Jury* 146, 160-61 (1966). Madonna should not, therefore, be second-guessed as to his intention to take the stand had his preclusion motion been granted,[2] for, as was said in *Snyder* v. *Massachusetts*, 291 U.S. 97, 116 (1934):

> "A defendant who has been denied an opportunity to be heard in his defense has lost something indispensable, however convincing the *ex parte* showing."

(b) Equally specious is the government's contention that Madonna had the burden, in support of his motion, of making "the fullest of factual showings" and "[h]aving failed to provide such a showing, or concretely to request a determination, Madonna cannot now complain of the result." G.B. 30.

The government knows, of course, that under Rule 609(a)(1), Fed. R. Evid., the burden of proof is *upon*

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[2] The government points out that the order denying Madonna's motion, although signed on November 9, was not filed until November 15, after all parties had summed up, and it argues somewhat opaquely:

> "The filing of the decision at that late date, without any further request for a ruling by Madonna, itself demonstrates his lack of concern for the issue." G.B. 27, n. **.

We fail to see what further request for a ruling Madonna should have made after the court ruled on November 9, "Motion denied as indicated on the record." A. 284. It should be noted that the government does not, because of the reporter's apparent neglect to note the judge's action in the record on November 9, challenge the recital of the order. Indeed, it could hardly place such heavy reliance upon the reporter's infallibility in this connection in the light of its distrust of his accuracy in another connection. See G.B. 43, n. *.

the prosecutor, not upon the defendant.[3] But even if the burden were Madonna's, he fully sustained it by reciting in his motion the necessary facts about his prior conviction. A. 281. The government argues that he was required also to make a proffer of his proposed testimony, but it relies in this connection upon pre-Rule 609 cases,[4] where the burden was on the defendant. G.B. 29-30. Moreover, however important it may have been in pre-Rule cases for the court to be informed of what the

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[3] If the government did not know this earlier, it must have learned it from the authorities cited at A.B. 39. See also *United States* v. *Mahone*, 537 F.2d 922, 929 (7th Cir. 1976), and legislative history there cited:

> "Thus the rule puts the burden on the proponent of such evidence to show that it should be used—to show that the probative value of the evidence outweighs its prejudicial effect to the defendant." (Remarks of Representative Hungate).
>
> * * *
>
> "What the present compromise does is to say that you can inquire on cross-examination about those types of prior convictions which really bear on credibility, and you can ask about all other felonies on cross-examination, only if you can convince the court, and the burden is on the government, which is an important change in the law, that the probative value of the question is greater than the damage to the defendant. . . . now the government is going to have the burden of proof if it wants to go beyond cross-examination about the type of crime which does in fact bear strictly on credibility." (Remarks of Representative Dennis).

[4] To the extent that this Court, in those cases, relied upon the *Luck* line of cases from the District of Columbia Circuit, see, *e.g.*, *United States* v. *Cacchillo*, 416 F.2d 231, 234 (2d Cir. 1969), and *United States* v. *Costa*, 425 F.2d 950, 954 (2d Cir. 1969), *cert. denied*, 398 U.S. 938 (1970), it has been pointed out that, in shifting the burden to the prosecutor, "Rule 609(a) affords more protection to a defendant than did the District of Columbia Circuit in its cases expounding the *Luck* doctrine." 3 Weinstein, *Evidence* 609-67 (1976).

defendant's testimony would be, the sole determination to be made under Rule 609(a)(1) is whether the probative value of the prior conviction outweighs its prejudicial effect to the defendant. For that determination the court needs no proffer of what defendant would say if he took the stand.[5] Finally, even if the court needed to know what Madonna's testimony would have been, the government has demonstrated the total speciousness of its argument by asserting, in another context, that the court already knew it "on the common sense assumption that he would have denied the obvious inferences to be drawn from the circumstantial proof and the direct proof offered by Visceglie . . . ." G.B. 34.

(c) Undoubtedly aware, notwithstanding its contention to the contrary, that Rule 609(a)(1) placed the burden of proof upon the prosecution, the government now seeks to argue that the burden was sustained. G.B. 30-34. That argument, we submit, is a total fraud.

To begin with, far from making the showing that Rule 609(a)(1) required it to make, see *United States* v. *Mahone*, 537 F.2d 922, 929 (7th Cir. 1976), the prosecution here *did not even respond to Madonna's motion.* To eke out a demonstration that it sustained its burden, the government asserts that "the facts underlying Madonna's conviction were well known to the District Court" because "[t]hey were the subject of lengthy discussion during the pre-trial bail proceedings, . . . which the District Court explicitly stated that he reviewed." G.B. 30, n. * .

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[5] Since this case is governed by Rule 609(a)(1) and not by prior law, the Court need not consider here the grave Fifth Amendment question that would be raised by requiring a defendant in a criminal case, as a condition for obtaining a ruling on whether he may testify in his own defense without fear of impeachment by a prior conviction, to disclose his proposed testimony to the prosecution.

The government's citations to the transcripts of the bail hearings, none of which were held before Judge Carter, are all to statements by counsel, mostly the prosecutor,[6] generally adding no more details than were stated in Madonna's motion itself. But, whether or not the cited transcripts contained the material that would satisfy the prosecution's Rule 609(a)(1) burden, they could not even begin to serve that purpose until brought to the attention of Judge Carter and considered by him in connection with Madonna's motion. To that end, as we have already said, the government cites Tr. 9/7/76 at 50 for the proposition that Judge Carter "explicitly stated that he reviewed" the transcripts. The cited transcript, however, *shows no such thing.* All it shows is that Judge Carter called for "the minutes of all these various hearings" and the prosecutor replied that some of them had not yet been transcribed and promised to deliver them that evening. See also *id.* at 51-52 and 55. There is thus nothing in the record to show that the transcripts were ever delivered to Judge Carter, let alone reviewed by him.

Moreover, even if the transcripts did, at some point, reach the judge, we submit that he could hardly have paid much attention to them, for, six days after denying Madonna's motion to preclude the use of the prior conviction, Judge Carter *seemed totally unaware that there had ever been a prior conviction.*[7]

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[6] One of the prosecutor's statements, unsupported, of course, by any evidence, referred to alleged parole violations and maligned the character of the lawyer who represented Madonna in the earlier case. Tr. 8/31/76 at 12.

[7] One of the prosecutor's speeches was interrupted by the following colloquy (A. 266-67):

"The Court: Mr. Madonna had a prior conviction?

"Mr. Flannery: Yes. Murder, in 1954.

"Mr. Alch: That is not quite correct, your Honor. It stands as manslaughter.

"The Court: How about Mr. Larca?

"Mr. Flannery: No. He has no prior convictions."

4. On the issue of the exclusion of the proffered Ben Larca-Ralph Battista testimony, the one single light shining through the opacity of the government's answering argument (G.B. 34-41) is that absolutely no attempt is made to refute Madonna's demonstration at A.B. 28-31 that the testimony was *not hearsay*. That unrefuted demonstration, we submit, is sufficient to warrant the reversal here sought.

5. As to the admissibility of the proffered statements, assuming them to be hearsay, the government's argument is threefold: that "Madonna never properly raised the issue" below, that the court correctly held the evidence to be inadmissible hearsay, and that the exclusion of the evidence was harmless, if error at all. G.B. 34-35.

(a) The Court need not pause long over the assertion that the issue was not properly raised below, for the government itself admits, at G.B. 36, that "Madonna's present point was technically preserved on the record . . . ."[8]

(b) As for the correctness of the ruling below, Madonna finds it unnecessary to add anything to what has been said at A.B. 31-35.

(c) In support of its argument that the exclusion of the evidence was harmless, the government again misrepresents the record. At G.B. 40-41, it cites Tr. 1256-57 and 1285-86 for the proposition that "the jury was already told that Madonna was angry about the loan of

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[8] The government calls the defense preservation of the point "belated" (G.B. 36), but an assertion to the court of a basis for admission, even if it occurs at the end of a long argument, is timely so long as it is advanced before the court rules on the question.

the car." Reference to those pages will show, however, that all that the witnesses were permitted to say was that they saw Madonna in apparently angry conversation with Larca, but the subject of the conversation was stifled by the Court. The jury thus never heard from any source[9] the crucial fact that Madonna was angry over the loan of his car to Boriello. The excluded declaration was the only evidence Madonna could offer as to his purpose in accompanying Larca to 58th Street and Fifth Avenue and, moreover, was the only evidence of what happened between Boriello's taking the car and Madonna's appearance at the rendezvous. The exclusion cannot possibly be said to have been harmless, therefore, especially in light of the court's permissive attitude toward the prosecutor's distortions of the evidence concerning the movements of the rented Ford and the circumstances of Madonna's arrival at Larca's house. See A.B. 13 and 35 n. 18.

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[9] That defense counsel argued in summation that it was the loan of the car that evoked Madonna's anger (see G.B. 41, n. *) cannot render harmless the exclusion of the factual basis for the argument, for, without the factual basis, the jury could well have rejected the argument as the mere wishful thinking of an advocate.

CONCLUSION

The arguments advanced in appellant's main brief remain unanswered. Upon those arguments and the arguments herein advanced, Madonna's conviction should be reversed.

Respectfully submitted,

EDWARD BENNETT WILLIAMS
HAROLD UNGAR
Attorneys for Defendant-Appellant
1000 Hill Building
Washington, D. C. 20006
(202) 331 - 5000

GRAHAM HUGHES
Of Counsel

THE ALPERT PRESS INC., 644 PACIFIC ST. BKLYN., N.Y.